United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-2294

To be argued by
ROBERT M. PEET

United States Court of Appeals
FOR THE SECOND CIRCUIT

TERESA M. BURNS, as Administratrix of the Goods, Chattels and Credits of George Vincent Burns,

Plaintiff-Appellant,

against

PENN CENTRAL COMPANY, n/k/a PENN CENTRAL TRANSPORTATION COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

ROBERT M. PEET
Attorney for Defendant-Appellee
466 Lexington Avenue
New York, N. Y. 10017
Tel. No. (212) 340-2504

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Statement of Facts

[Numbers in parentheses refer to pages of the Joint Appendix.]

Plaintiff's brief omits the following significant, uncontradicted evidence:

The principal safety duties of Burns as a trainman were to announce stations and exits to passengers, to open and close side and trap doors securely in the vestibules so passengers could get on or off the train promptly, to help passengers on and off the train, and to prevent passengers from opening exits and from boarding or leaving the train while it was moving (99-100A, 108A, 126A, 182-189A). Burns had been qualified and worked as a conductor since 1961 (144A, 146A).

The track on which Train 8748 approached 125th Street Station was the second one from the west side (45A). As appears in plaintiff's Exhibits 4 and 6, which were marked in evidence (110-112A) but not printed in the Joint Appendix, a low, solid metal fence protects the outer sides of the four-track area. The considerable height of the track above the street appears best in plaintiff's Exhibits 1A and 1C, also not printed in the Joint Appendix. The building from the roof of which Burns was shot was located between 128th and 129th Streets (132A). Burns was shot when about 360 feet from the Station (132A, 134A). Plaintiff did not prove whether the shooting of Burns was accidental or intentional.

With respect to the prior stoning episodes admitted into evidence, the time of day and whether any injury or damage occurred was not set forth. Only one of the eight prior stonings occurred in the winter months when Burns' shoot-

ing did, and that one along with six others occurred during daylight hours, while Burns' shooting took place after dark when train and street lights were on (88A, 120A). In only one of the prior stonings was any one injured, and that was presumably a passenger, since a window was broken, and occurred at 125th Street (where plaintiff claims Burns should have opened the doors) (87A). In only three of the prior stonings was any damage to property done, and in each case it was a broken window (87A).

Assistant conductor Charles Ruhs, who had been opening and closing trap doors for 125th Street Station since 1948 (50A), never thought it hazardous to open or close trap doors there and knew of no stonings in the area 125th to 138th Streets (50-51A, 56-58A).

The conductor on Train 8748, Peter McGeoch, a full time man on the Hudson Division (71A) who had worked with Burns before (69A), never knew of prior stonings in the area 102nd to 132nd Streets (97-98A).

The engineer on Train 8748, John Brown, who had passed 125th Street thirty to thirty-eight times a week for five years (175A, 177A), had never been stoned or fired on in the area 125th to 130th Streets (177-178A, 180A). Although he operated the train from the head right-hand vestibule, sometimes with the window, which was six to eight inches to his right, open (175-176A), he neither considered his job dangerous, nor would he have so considered it had he known of the eight prior stonings (178-180A).

Lawrence Forbes, trainmaster in charge of commuter service (181A), whose duties included conferring with the chairmen of union locals about eliminating unsafe practices (189-190A), never received any suggestion that the practice with respect to opening exits of trains approaching 125th Street Station was hazardous or should be changed and never was requested to change the practice

(190A). He considered the stonings too infrequent to warrant posting signs about them on train crew bulletin boards (214A).

John Loconto, local chairman of the trainmen and of their grievance committee (147A), whose duty it was to pass on to management any complaints as to unsafe work practices (148A), received no complaints from Burns or the other trainmen as to stonings between 125th and 130th Streets (151A), knew of no prior shootings (151-152A), and never requested management to prohibit the opening of exits until trains reached 125th Street Station (148-149A).

Defendant's records show that for the week of March 9th through March 15, 1968, 2,859 trains and 14,925 cars passed 125th Street Station, that this was a typical week, that on any average weekday 145,963 commuting passengers passed this station, that for the five weekdays the average total would be five times as great (599, 818), and that on a weekend the average for the two days would drop to 29,192 (191-195A).

The Joint Appendix, which was prepared, served and filed by plaintiff acting alone without ever letting defendant take part in its preparation, as required by Rule 10 of the Federal Rules of Appellate Procedure, omits a number of clarifying picture exhibits which by stipulation were part of the record, and fails to include the fact that the jury hung four for defendant and two for plaintiff.

Plaintiff's brief (page 6) refers to decedent's wife and to the number and ages of decedent's children solely in order to elicit sympathy, though these facts are not only not found in the evidence set forth in the Joint Appendix as having been received during trial, but are as irrelevant to this appeal as the fact, recorded on page 28 of Court's Exhibit 1, that Burns' widow and children currently receive income of $896 a month and collected $71,400 on insurance policies.

POINT I

The trial court correctly decided that there were no issues of fact as to defendant's liability for the jury to determine.

Contrary to plaintiff's assertions (brief, page 9), the Supreme Court and this Court have frequently recognized that even in cases arising under the Federal Employers' Liability Act there may be no fact issues for a jury to pass upon.

> *Brady* v. *Southern Ry. Co.*, 320 U.S. 476 (1943);
> *Moore* v. *Chesapeake & O. R. Co.*, 340 U.S. 573 (1951);
> *Herdman* v. *Penn. R. Co.*, 352 U.S. 518 (1957);
> *Inman* v. *Baltimore & O. R. Co.*, 361 U.S. 138 (1959);
> *New York, N.H. & H. R. Co.* v. *Henagan*, 364 U.S. 441 (1960);
> *Nicholson* v. *Erie R. Co.*, 253 F. 2d 939 (2d Cir. 1958);
> *Hartel* v. *Long Island R. Co.*, 476 F. 2d 462 (2d Cir. 1973), reh. *en banc* den. May 3, 1973, cert. den. 414 U.S. 980.

This is true in part because railroad employers are not insurers, are not liable as though under workmen's compensation, and may not be convicted of negligence on the basis of speculation or of hindsight. It is also true because the burden of proving his case never shifts from a plaintiff and he will not reach a jury if the trial court decides that his evidence is insufficient to make out a *prima facie* case.

It is widely held that an employer who has no advance knowledge of, or reason to anticipate, a criminal assault upon his employee, may not be held liable in a negligence action for injuries resulting from such an assault.

Madison v. *Phillips Petroleum Co.*, 88 F 2d 515 (C.C.A. 5, 1937), reh. den. 88 F. 2d 520, cert. den. 301 U.S. 703;

Hartel v. *Long Island R. Co., supra*—FELA suit;

Mormino v. *Leon Hess, Inc.*, 119 F. Supp. 314 (S.D.N.Y. 1953), a. 210 F 2d 831 (2d Cir. 1954) —Jones Act suit;

Farmer v. *O/S Fluffy D*, 220 F. Supp. 917 (S.D. Tex. 1963)—Jones Act suit;

Jaynes v. *Bush*, 136 Ark. 602, 203 S.W. 693 (1918) —FELA suit;

Fraser v. *Chicago, R.I. & P.R. Co.*, 101 Kan. 122, 165 Pac. 831 (1917)—FELA suit;

Weigand v. *Chicago, R.I. & P.R. Co.*, 121 Kan. 610, 249 Pac. 615 (1926)—FELA suit;

Ward v. *Southern Ry. Co.*, 206 N.C. 530, 174 S.E. 443 (1934)—FELA suit;

Carter v. *Atlantic Coast Line R. Co.*, 109 S.C. 119, 95 S.E. 357 (1918)—FELA suit;

Schaff v. *Bourland*, 266 S.W. 843 (Tex. Civ. App. 1924)—FELA suit;

Roberts v. *St. Louis & S.F. R. Co.*, 136 Kan. 749, 18 P. 2d 167 (1933)—FELA suit;

Shane v. *Lowden*, 232 Mo. App. 360, 106 S.W. 2d 956 (1937)—FELA suit;

Bracquee v. *Mottet Co.*, 175 Cal. 258, 165 Pac. 696 (1917);

Howard v. *Lightner*, 214 A. 2d 474 (D. Col. 1965);

Murray v. *Osenton*, 126 So. 2d 603 (Fla. App. 1961);

Drake v. *Topeka R. Co.*, 96 Kan. 727, 153 Pac. 539 (1915);

Lencioni v. *Long*, 139 Mont. 135, 361 P. 2d 455 (1961);

Sitarek v. *Montgomery*, 32 Wash. 2d 794, 203 P. 2d 1062 (1949);

Kelly v. *Shelby R. Co.*, 15 Ky. L. R. 311, 22 S.W. 445 (1893);

McMillin v. *Barton-Robison Convoy Co.*, 182 Okla. 553, 78 P. 2d 789 (1938);
Lewis' Adm'r. v. *Taylor Coal Co.*, 112 Ky. 845, 66 S.W. 1044 (1902).

The same principle applies where one employee assaults another and *respondeat superior* is inapplicable.

Atlantic Coast Line R. Co. v. *Southwell*, 275 U.S. 64 (1927);
Lykes Bros. S.S. Co. v. *Boudoin*, 211 F 2d 618 (5th Cir. 1954), rev'd on other grounds 348 U.S. 336;
Connelly v. *Farrell Lines*, 268 F 2d 653 (1st Cir. 1954), cert. den. 361 U.S. 902;
Guzzi v. *Seas Shipping Co.*, 270 F 2d 715 (2nd Cir. 1959);
Asdorian v. *N.Y. Central R. Co.*, 7 AD 2d 789 (3rd Dept. 1958), rearg. den. 8 AD 2d 664;
Young v. *N.Y. Central R. Co.*, 88 Ohio App. 352, 88 N.E. 2d 220 (1949), cert. den. 339 U.S. 986.

These principles have served as the basis for the courts of this jurisdiction dismissing many non-employee complaints based on third party crimes and assaults as the cause of injury:

Craig v. *N.Y. Central R. Co.*, 272 N.Y. 610 (1936);
Duner v. *Hudson & M. R. Co.*, 264 App. Div. 229 (1st Dept. 1942), aff'd 290 N.Y. 849;
Ford v. *Grand Union Co.*, 268 N.Y. 243 (1935);
Martincich v. *Guardian Cab Co.*, 10 N.Y.S. 2d 308 (1938);
Bolsenbrock v. *Tully & DiNapoli*, 12 AD 2d 376 (1st Dept. 1961), aff'd 10 N.Y. 2d 960;
Bellone v. *Seas Shipping*, 16 AD 2d 971 (2nd Dept. 1962);
See *Del., L. & W. R. Co.* v. *Donahue*, 238 Fed. 770, 771-2 (C.C.A. 2, 1916).

The quotation from *Lillie* v. *Thompson,* 332 U.S. 459, 462 cited on page 14 of plaintiff's brief, stating "That the foreseeable danger was from intentional or criminal misconduct is irrelevant," once examined in context clearly means that the irrelevancy pertains only to that case, where the demurred-to complaint alleged that the railroad employer was aware of conditions which created a likelihood that a young woman performing the duties required of her would suffer just such an injury as was inflicted upon her. Footnote 4, page 462 of the Supreme Court's short *per curiam* opinion quotes from the Restatement of Torts, Section 302, Comment n, to explain that an actor may be held liable for a third person's criminal acts only under certain limited circumstances, such as "where he knows of peculiar conditions which create a *strong* likelihood of intentional or reckless misconduct." (Emphasis supplied.) It is only when the actor has such knowledge and fails to act, i.e., where he is negligent, that the precise mechanism of injury need not be foreseen.

Comment d of Section 302B of the Restatement of Torts, 2d ed., makes clear that the criminality of the third person's act which causes injury is significant, as follows:

> "Normally the actor has much less reason to anticipate intentional misconduct than he has to anticipate negligence. In the ordinary case he may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to any one. This is true particularly where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law. Even where there is recognizable possibility of the intentional interference, the possibility may be so slight, or there may be so slight a risk of foreseeable harm to another as a result of the interference, that a reasonable man in the position of the actor would disregard it."

Professor Prosser (Torts, 3rd ed., pages 175-6) stated the idea as follows:

> "There is normally much less reason to anticipate acts on the part of others which are malicious and intentionally damaging than those which are merely negligent; and this is all the more true where, as is usually the case, such acts are criminal. Under all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law . . ."

The case at bar is controlled by the very recent decision of this Court in *Hartel* v. *Long Island R. Co.*, 476 F 2d 462, *supra*, where decedent ticket agent was shot inside defendant's passenger station at Mineola by three men attempting a robbery at about 7 A.M. just after he had entered the ticket office to unlock the steel shutter covering the ticket window, then entered the adjacent waiting room via a solid wooden door in order to raise the steel shutter covering the ticket window. The trial court dismissed the complaint on the ground that the shooting was not reasonably foreseeable. This Court affirmed, stating (page 464):

> "To establish her case plaintiff had to show that the danger to her husband from armed criminals was, or should have been, foreseen by the defendant. Once this was shown, a further showing that defendant was negligent in whole or in part in failing to minimize this danger would have been required."

In the *Hartel* case this Court also approved the exclusion by the trial court of evidence of ten robberies or attempted robberies in the four preceding years at other stations of defendant located from 4 to 29 miles from Mineola, since they did not occur at "the exact locus of the incident giving rise to the litigation" (page 464). It

was also held that the trial court correctly excluded conversations and correspondence between defendant and the ticket agents' union in which the latter asked for increased protection from armed robbery but without specifically referring to Mineola. Finally, this Court concluded that there was no proof that installation of a peephole in the steel shutter or in the solid door to the waiting room from the ticket office or of a silent alarm would have prevented the shooting.

The case at bar is a much weaker one for plaintiff than the *Hartel* case. Since there was no proof of any prior shootings in the 125th Street area, there was clearly no reason to foresee the shooting. Cf. *Martucci* v. *Brooklyn Children's Aid Soc.*, 140 F 2d 732 (C.C.A. 2, 1944), on relevance of proof of no prior accidents.

During an average week, nearly 3,000 trains, 15,000 cars and 630,000 passengers passed 125th Street and members of the train crew were as exposed as Burns was, yet no shootings occurred. Can such an area be described as one where a "strong likelihood" of train crew members being shot existed?

No complaints had been received from Burns, his union representatives or from any one else as to stonings or seeking to modify or change the customary method of performing Burns' duties or objecting that this method was unsafe. In other words, hundreds of ordinary, reasonable men, both from management and labor, experienced in railroading, had found the existing practices safe enough to warrant their continuation.

No personal animosity or prior relationship existed between Burns and his assailant, whose presence on a rooftop with a gun was unknown to defendant on that day or on any prior day. Crimes of violence involve either a quarrel between two persons or motivations such as jealousy, passion, vengeance, lust, or monetary gain. Burns'

shooting was without prior relationship between Burns and his assailant and without apparent motive. Accordingly, it was less predictable than the ordinary crime of violence. Even drunken driving, which is common enough, was held not reasonably foreseeable in *Inman* v. *Baltimore & O. R. Co.*, 361 U.S. 138, *supra*. Moreover, the criminal was not on defendant's premises or on any place over which defendant had control, which is one of the bases on which liability frequently rests. Also, defendant had no reason not to rely on the City of New York's police force to prevent such crimes by persons situated off railroad premises.

If, in fact, the shooting was accidental rather than intentional (as to which there was no proof), it was even more unforeseeable to a reasonable man.

Plaintiff seeks to bolster his case by referring to prior stonings of trains in the elevated track area between 102nd and 132nd Streets. But the risk involved in stonings is minimal and quite different, and prior stonings do not lead one to expect a shooting. It has even been held that prior snowballings of a bus are not a basis for predicting the throwing of a peach pit through its open window. *Drew* v. *Troy Fifth Ave. Bus Co.*, 9 AD 2d 587 (3rd Dept. 1959).

Stonings are usually harmless; shootings are usually not. Stonings are usually performed by children; shootings, by adults. Stones are available in the streets or in vacant lots to children (though not on roof tops); guns are seldom available to children. Stones are thrown to break windows; shots are fired to injure persons. Stones can easily be dodged by a trainman; bullets cannot. Stones large enough to do damage have lost most of their force by the time they travel the long distance from street up to train, if they can get that far; bullets have not. A moving small target like a man is much harder to hit with a stone than a long series of windows. A stationary target like a man or a train at a station platform is much easier to

hit than a moving target, which makes it more likely that any one desiring specifically to hit a trainman with a stone or shoot him would wait until the train stops and he has to go to the station platform. At night, an assailant would normally wait until the train comes out of the dark into the lighted platform area in order to see better.

Plaintiff suggests a trainman would be safer in the vestibule than on the steps. This is purely speculative. There is no proof that either place was unsafe. Consequently, there was no basis for issuing warnings to Burns.

If trains are not to be subject to considerable delay, side vestibule and trap doors must be opened by trainmen before the train reaches the station, and enough in advance to allow for inevitable interruptions and delays due to malfunctions, people, weather, etc. They must be opened without rushing, so as to avoid risk of injury to trainmen. They must be opened before impatient passengers attempt to open them on their own. Once opened, a trainman must stay at the opening, preferably on the bottom steps from which he can see up and down the platform, to keep passengers from jumping on and also off the train before it stops. In any event, once the train stops he must descend to the station platform in order to help passengers on and off and be exposed at that point.

Very specifically, the proof in the case at bar shows minimal risk even from stonings. Burns was hurt about 7 P.M. on March 15th, at a time of day, time of year and location when stonings, as the proof makes clear, rarely occurred. No one had been injured from these stonings while in Burns' position, and only one person, not a member of the train crew, had been injured, from broken glass. There was less risk where Burns was than inside the body of the car, particularly since windows not persons were the stoning targets. On the steps Burns could see a stone coming and dodge it; inside, he could not. If he carried out his door opening task after the train stopped, he

could more easily be hit than when a moving target. Had Burns been hit under those circumstances, undoubtedly plaintiff would be arguing that he should have opened the doors before the train stopped so as to minimize his exposure. And what would plaintiff argue if Burns had been shot inside the car by a passenger?

POINT II

The evidence of prior stonings was inadmissible.

Plaintiff's argument (brief, page 29) seems to be directed to the point that if this Court should order a new trial, it should direct the new trial judge to allow in evidence the same proof of prior stonings as the court below did. This argument is not properly made to this Court on this appeal, since plaintiff is not alleging error in the trial court's rulings and since what evidence of this sort should be admitted at a trial is largely within a trial court's discretion.

Defendant urged the trial court not to admit any evidence of prior stonings (29-38A, 89-90A). At the close of the case the trial court altered its earlier position and confessed that in fact there was no "relationship between a stone and a gun" (226A), and that "just because kids throw stones" doesn't make the area dangerous (229A), and that stone throwing by kids "does not suggest to any rational person that somebody may shoot a gun at somebody" (223A). The court further pointed out that the absence of proof of any one standing in the vestibule being hit by a stone and the absence of complaint by any employee as to stonings (232A, 234A, 235A, 237A) made plaintiff's argument even more untenable. The court also said (226A): "I told you when I let that evidence in I had grave doubt as to whether it should go in, but if I throw it out there would be no way of getting to the Court of Appeals."

The cases cited by plaintiff (brief, page 23) are not in point, since they either support defendant's position here or they involve prior accidents of the same kind at the same place occurring under similar circumstances. Such prior accidents have almost invariably been admitted in evidence by trial courts because they compare oranges with oranges, not oranges with apples.

It is well established, in this Circuit and in New York State, that there must be substantial similarity of place, time, manner, and circumstance between the prior accident and the accident in litigation in order to make the prior accident admissible, and that other prior accidents must be ruled out as both irrelevant, confusing and prejudicial.

Hartel v. *Long Island R. Co., supra;*
Callis v. *Long Island R. Co.,* 372 F 2d 442 (2nd Cir. 1967), cert. den. 389 U.S. 827;
Plough v. *Baltimore & O. R. Co.,* 164 F 2d 254 (C.C.A. 2, 1947), cert. den. 333 U.S. 861;
Gallagher v. *City of New York,* 30 AD 2d 688 (2nd Dept. 1968);
Kaplan v. *City of New York,* 10 AD 2d 319 (1st Dept. 1960);
Jasinski v. *N.Y. Central R. Co.,* 21 AD 2d 456 (4th Dept. 1964).

Any other rule would lead to very loose thinking and very inapt and confusing comparisons that could be of no help to a jury. The same rule applies in other jurisdictions.

Sue v. *Chicago Transit Authority,* 279 F 2d 416 (7th Cir. 1960);
Jones & Laughlin Steel Corp. v. *Matherne,* 348 F 2d 394 (5th Cir. 1965);
Baltimore & O. R. Co. v. *Moore,* 13 F 2d 364 (C.C.A. 3, 1926), cert. den. 273 U.S. 727.

The *Gallagher* case, *supra,* is particularly significant as holding that it was error to have admitted evidence of the commission of prior crimes (a knock down and a knifing) at a public junior high school to prove that defendant City of New York should have foreseen a rape at the same school.

In the *Sue* case, *supra,* where evidence of incidents of throwing objects at defendant's vehicles all over Chicago for five prior years was deemed irrelevant to a case involving a passenger hit in a bus by a rock coming through an open window, the court commented (page 418):

> "Nor would the information . . . have been relevant. It was remote in time and place. It would not have established notice of danger at the site of the incident involved. Defendant operated as a common carrier in a city of nearly four million people and over many miles of routes utilizing surface, subway and elevated facilities. Characters of neighborhoods in such a large city change in no more than a few blocks and may vary in a short period of time."

The reasons why defendant's knowledge of prior stonings is irrelevant to the issue of whether defendant should reasonably have foreseen the shooting of Burns, have already been set forth toward the end of Point I, and will not be repeated here.

If the stonings are irrelevant on the issue of defendant's negligence, they are equally irrelevant with respect to Burns' contributory negligence.

POINT III

There was insufficient evidence of Burns' contributory negligence to submit the issue to the jury.

Defendant initially took the position that it was not negligent as a matter of law but that if the trial court was going to submit this issue to the jury, then it must also submit to the jury the issue of Burns' contributory negligence, since he was just as capable of foreseeing the shooting as defendant was.

Plaintiff's attorney, on the other hand, knowing from the outset that an appeal was inevitable (171A), sought to inject error into the trial. He therefore joined defendant in urging the court to submit to the jury the issue of Burns' contributory negligence (171A), thereby ignoring the interest of his client in achieving the highest possible damages in hopes of creating possible appellate error. At the same time, plaintiff was forced into the odd position of urging that the evidence of prior stonings was essential to defendant's negligence but even without Burns' knowing about them the jury could have found Burns negligent. Yet if the court was correct in dismissing the complaint, *a fortiori* it was correct in not submitting Burns' negligence to the jury.

Once again plaintiff compares apples with oranges by arguing (brief, pages 10-12, 30) that Burns was negligent in going upon the vestibule steps while the train was in motion because it might make a sudden stop, and accordingly was negligent in going upon these steps while the train was in motion and getting shot while there. But the former, if negligence (which it was not), was not a cause of the shooting, and the shooting was not reasonably foreseeable. The likelihood of Burns being shot was, as far as any one could predict, as great inside the car as on its steps, since no one could tell whether a passenger or some one else would shoot him.

Plaintiff compounds the confusion by seeking to inject Section 83 of the Railroad Law into the argument (brief, page 32). Section 83 merely exempts railroads from liability for injuries to passengers while on car platforms in violation of printed notices posted inside the cars if there is proper accommodation inside. Contrary to what plaintiff asserts (brief, page 32), it places no positive duties on railroads or their employees. If any intent can be read into it, it would seem to have been passed at least in part so that railroads could let their employees attend to their many duties without spending too much time preventing passengers from going onto platforms of moving trains, which was left by the statute to the posted notices to control. In any event, a trainman can exert control from the steps as well as from the vestibule platform to prevent passengers from trying to disembark before the train stops, and from the steps location can best prevent prospective passengers from hopping onto a moving train. The risk to passengers (who may be very young, very old, mentally or physically unsound, inebriated, ill, etc.) from entering open vestibules of moving trains is infinitely greater than the risk to trainmen, who do so with training backed by experience as part of their duties, knowing the track and the train schedule, holding railings when appropriate, and being physically fit and alert, and it is this risk to passengers which concerned the legislature.

CONCLUSION

The judgment of the trial court dismissing the complaint should be affirmed.

Respectfully submitted,

Robert M. Peet
Attorney for Defendant-Appellee
466 Lexington Avenue
New York, N. Y. 10017
Tel. No. (212) 340-2504

Due and timely service of Two copies
of the within BRIEF is hereby
admitted this 13TH day of JANUARY 1971

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Attorney for Appellant